1-5-1976

Kenny Earl Gardner v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-0992

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-992

KENNY EARL GARDNER — APPELLANT

vs. APPEAL FROM THE FLEMING CIRCUIT COURT
HONORABLE JOHN A. BRESLIN, JR., JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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I hereby certify that a copy of this Brief has been mailed, postage prepaid, to Honorable Richard L. Hinton, Circuit Judge, Courthouse, Flemingsburg, Kentucky 41041; Honorable Woodson T. Wood, Commonwealth Attorney, State National Bank Building, Maysville, Kentucky 41056; and Honorable Edward A. Marye, Jr., Clay, Marye and Cowden, 50 Broadway, Mount Sterling, Kentucky 40353, Counsel for Appellant, this the 5th day of January, 1976.

James M. Ringo
Assistant Attorney General

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MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

1.

WHETHER THE ORIGINAL LOOKING INTO A LOCKED STRIPPING ROOM WAS A "SEARCH" AND THE CONTENTS OF THE ROOM WERE SOMETHING OBSERVED IN "PLAIN VIEW"?

2.

WHETHER THE ORIGINAL LOOKING INTO THE STRIPPING ROOM WAS INCIDENTAL TO THE ATTEMPTED EXECUTION OF THE ARREST WARRANT AND THUS WAS LAWFUL?

3.

WHETHER THE AFFIDAVIT ON ITS FACE WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT?

COUNTERSTATEMENT OF THE CASE

On July 11, 1975, in the Fleming Circuit Court, the jury found appellant, Kenny Earl Gardner, guilty of burglary and fixed his punishment at confinement in the penitentiary for two years (Transcript of Record, hereafter "TR", 14, 21).

This criminal appeal is before the Court upon an agreed statement pursuant to RCr 12.72.

The only issue on appeal is the validity of the initial observations, the affidavit for, and the underlying facts surrounding the issuance of a search warrant and the subsequent admission at trial of evidence discovered in the search over objection and motion to suppress made by defendant (TR 2).

Appellee accepts appellant's statement of the case as substantially correct. Additional facts and circumstances surrounding the points upon which appellant relies for reversal will be set forth in the argument which follows.

ARGUMENT

1. THE ORIGINAL LOOKING INTO A LOCKED STRIPPING ROOM WAS NOT A "SEARCH" AND THE CONTENTS OF THE ROOM WERE SOMETHING OBSERVED IN "PLAIN VIEW."

Appellant argues that when Detective Ison and Sheriff Saunders went into the tobacco barn located 100 to 150 feet behind appellant's trailer and looked into a stripping room through a hole in one wall where a stove pipe had once gone through, they made an illegal "search" and that the objects observed in the stripping room could not be used as a basis for the issuance of a search warrant.

Appellee submits that the looking into the stripping room did not constitute a "search" and that they were lawfully on the premises to execute an arrest warrant for second degree forgery issued by County Judge Bill Owens against appellant (TR 1). When Detective Ison and Sheriff Saunders arrived at appellant's home they saw nobody out there (TE 10, 11). They then went out to the barn to see if they could find appellant to execute the arrest warrant (TE 14, 15), when inside the barn, they looked through a hole in the wall into a stripping room and saw a red rotary tiller and some tools which they thought might be the ones stolen from a break-in that occurred in Rowan County (TE 28).

The detective and sheriff went into the barn, not for the purpose of looking for these stolen items, but looking for appellant to execute the arrest warrant. They were properly there to effectuate this purpose and thus the observance of the contents of the stripping room,which were in plain view, was inadvertent and proper and the contents could be used as a basis for the issuance of a search warrant. This intrusion into the barn and the original looking into the stripping room was reasonable under the facts and circumstances in this case. Cf. Caine v. Commonwealth, Ky., 491 S.W.2d 824 (1973).

In addition, appellee submits that appellant was without standing to challenge the original looking into the barn and stripping room, since they belonged to appellant's mother and not to appellant (TE 18-22). See Smith v. Commonwealth, Ky., 375 S.W.2d 242 (1963). The farm where appellant's trailer was located was owned by his mother (TE 1).

2. THE ORIGINAL LOOKING INTO THE STRIPPING ROOM WAS INCIDENTAL TO THE ATTEMPTED EXECUTION OF THE ARREST WARRANT AND THUS WAS LAWFUL.

The purpose of looking into the stripping room was to

see if appellant was there in order to execute the arrest warrant against him. Seeing the red rotary tiller and other tools was inadvertent and incidental to their purpose of executing the arrest warrant. The officers were looking for appellant, not stolen items from recent robberies. Thus, the original looking into the stripping room was lawful.

After observing these items in open view, Detective Ison then returned to Flemingsburg and swore out an affidavit for a search warrant and the warrant was issued by the County Judge (TR 15).

3. THE AFFIDAVIT ON ITS FACE WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT.

The affidavit on its face was sufficient to establish probable cause necessary for the issuance of the search warrant by the county judge (TR 3-5). This Court in Caslin v. Commonwealth, Ky., 491 S.W.2d 832, 834 (1973), recognized the rule in this jurisdiction that it is not proper to go behind the allegations of the affidavit in determining whether the allegations furnish sufficient evidence of probable cause.

Appellant challenges the affidavit on the grounds that the identification numbers of the rotary tiller were included in the affidavit, but that Detective Ison admitted that he did not go inside the stripping room and thus had no way of knowing that the indentification numbers of that rotary tiller were (TE 16). He did have a list of items that had been stolen in a break-in over in Rowan County (TE 12, 13).

However, appellee submits that absent the identification numbers there was still sufficient information to furnish probable cause for the search warrant.

The citation of the identification numbers which the detective had not seen may have been the result of a clerical error as appellant suggests in his brief but does not render the affidavit insufficient to support the issuance of a search warrant.

CONCLUSION

The search and seizure of the evidence in question was not in violation of appellant's constitutional rights, thus the "poison tree" doctrine does not apply.

For the above stated reasons, we respectfully move that the judgment of the lower court be affirmed.

Respectfully submitted,

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